

AN ORDINANCE 9 8 0 5 1

APPROVING AN AGREEMENT TO SETTLE THE CONTROVERSY WITH WESTERN INTEGRATED NETWORKS, L.L.C. (WIN) AND ALL OF ITS DEBTOR SUBSIDIARIES; RELEASING \$200,000 TO WIN; AND AUTHORIZING THE CITY ATTORNEY AND BANKRUPTCY COUNSEL TO EXECUTE AND FILE ALL OF THE NECESSARY DOCUMENTS TO FACILITATE SETTLEMENT OF THIS MATTER.

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WHEREAS, pursuant to Ordinance No. 91488, which was passed after three (3) readings on March 23, April 6 and April 27, 2000, the City granted a fifteen (15) year non-exclusive cable franchise agreement (Franchise) to Western Integrated Networks, L.L.C. (WIN), which became effective on or about June 27, 2000; and

WHEREAS, the Franchise allowed WIN to utilize the City's public rights-of-way to construct, operate and maintain a City-wide cable television/broadband telecommunications system; and

WHEREAS, pursuant to Section 8c. of the Franchise, WIN was required to complete construction a City-wide system in accordance with the following construction schedule: 1) at least ten percent (10%) within two (2) years; 2) at least thirty-five percent (35%) within four (4) years; and 3) the remainder of the system (100%) within five years; and

WHEREAS, pursuant to Section 17 a-1 of the Franchise, as a condition precedent to the grant of the Franchise to WIN, WIN tendered a one million dollar (\$1,000,000.00) prepayment of Franchise fees to the City and agreed that the prepayment was a liquidated damage to be retained by the City in the event that WIN failed to construct a system in the City; and

WHEREAS, in addition to the \$1 million prepayment WIN made payments pursuant to the Franchise in the form of a: 1) \$100,000 Security Deposit (Section 26); 2) \$50,000 contribution to a scholarship fund to assist students in the communications field (Section 32 d.); and 3) \$15,000 payment for support of public, educational, and governmental programming (Section 12 j.); and

WHEREAS, WIN has failed to construct any cable system components and meet the first construction threshold, and does not intend to construct a cable system in the future; and

WHEREAS, in March of 2002, WIN filed for bankruptcy under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court in Denver, Colorado; and

WHEREAS, in November 2002 and February 2003, the City notified WIN of its breach of the construction requirements under the Franchise and of the City's intent to terminate the Franchise; and

WHEREAS, WIN responded in February of 2003 and demanded a return of the aforementioned payments totaling \$1,165,000 contending that the City suffered no loss and that the \$1 million prepayment was actually a penalty, and therefore unenforceable under Texas contract law; and

WHEREAS, the City contends that it did suffer multiple losses, including, lost competition, loss of an institutional network, and loss of additional incremental franchise fee revenues, which collectively exceeded the \$1 million liquidated damage and therefore which validates the liquidated damage provision; and

WHEREAS, after careful consideration, the parties have agreed to a proposed settlement and have filed with the Bankruptcy Court an Agreement to Settle Controversy and Motion for Order Approving Compromise of Controversy, subject to City Council approval; and

WHEREAS, pursuant to the proposed settlement documents, the City will release to WIN a total of two hundred thousand dollars (\$200,000.00) and the City will retain the remainder of all payments made by WIN under the Franchise, including any interest earned thereon, and each party will release the other party from any and all claims it may have under the Franchise; and

WHEREAS, Notwithstanding the City's position, City staff recommends approval of the Agreement to Settle Controversy in an effort to avoid the cost and risk associated with potential litigation; and

WHEREAS, according to WIN's bankruptcy counsel, no objections from the bankruptcy estate's creditors committee are anticipated, and based upon this information, it is expected that the Bankruptcy Court will grant the motion; and

WHEREAS, ultimately, WIN will reject its franchise agreement with the City in the bankruptcy proceedings, most likely as part of a reorganization plan, which will effectively terminate the Franchise; and

WHEREAS, this item was coordinated with the City Attorney's Office, which utilized the legal services of a bankruptcy specialist, Mr. Tim Fusco, of the law firm of Miller, Canfield, Paddock, & Stone; **NOW THEREFORE:**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

SECTION 1. An Agreement to Settle Controversy which was executed by the City's bankruptcy counsel, and filed in the Federal Bankruptcy Court in Denver, Colorado is hereby approved. A copy of this Agreement is attached hereto and incorporated herein for all purposes as Attachment I.

SECTION 2. The City is authorized to recognize revenue and adjust the budget in the amount of \$1,192,173.46 to be recorded in the General Fund (11-000) in Index Code 010744, entitled "Western Integrated Networks of Texas."

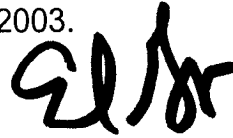
SECTION 3. Appropriations and a release of funds through payment are authorized from the General Fund (11-000), in Index Code 339523, entitled "Fees to Professionals Non Departmental," in the amount of \$200,000.00 payable to Western Integrated Networks, L.L.C., in accordance with the Agreement.

SECTION 4. The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director, may subject to concurrence by

the City Manager or the City Manager's designee, correct allocations to specific index codes and fund numbers as necessary to carry out the purpose of this Ordinance.

SECTION 5. This Ordinance shall take effect on the tenth (10th) day after the date of passage hereof.

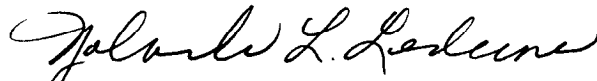
PASSED AND APPROVED this 21st day of August, 2003.




M A Y O R

EDWARD D. GARZA

ATTEST:


City Clerk

APPROVED AS TO FORM:


for City Attorney